

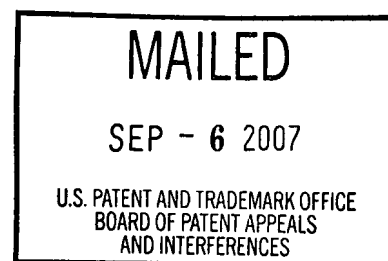
1 RECORD OF ORAL HEARING

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3 UNITED STATES PATENT AND TRADEMARK OFFICE

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6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES
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10 Ex parte ELISABETH LASKO, EVA SIMMONS, HANNELE NURMI,
11 ANNA KARIN JONBRINK, and ANDERS SILFVERSTRAND
12

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14 Appeal 2007-1322
15 Application 09/720,908
16 Technology Center 3700
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19 Oral Hearing Held: August 8, 2007
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23 Before MURRIEL CRAWFORD, WILLIAM F. PATE, III, and JENIFER
24 BAHK Administrative Patent Judges
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27 ON BEHALF OF THE APPELLANT:

28
29 TRAVIS D. BOONE, ESQUIRE
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34 The above-entitled matter came to be heard on Wednesday, August 8,
35 2007, commencing at 1:25 p.m., at the United States Patent and Trademark
36 Office, 600 Dulany Street, Alexandria, Virginia, before Paula Lowery,
37 Notary Public.

PROCEEDINGS

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THE CLERK: This is Calendar 19, Appeal Number 2007-72327.
The attorney is Mr. Travis Boone.

JUDGE PATE: Good afternoon, Mr. Boone.

MR. BOONE: Good afternoon.

JUDGE PATE: Just make yourself comfortable. We've had a time to look over this case beforehand, so we're ready to hear your arguments. Step right up to the podium.

MR. BOONE: This is my first oral argument, so if I need correction on anything --

JUDGE PATE: We'll guide you through.

MR. BOONE: Having had a look at the case overall, a quick overview, I guess, of what I think the main point of where the patentability lies is that this industry has been focused in terms of finding environmental solutions with essentially absorbent articles -- they say diapers at times -- when they're looking to find something that is environmentally friendly.

There's been pretty much a sole focus on biodegradable products. What we have done -- what my client has done -- is basically a paradigm shift.

Instead of looking at biodegradable products, they've come back and said, Look, we're going to make a product that's not biodegradable, yet is still environmentally friendly.

That's something the industry overall has not done, has not been focused on, and the art in the industry teaches away from using products -- this is what we're claiming -- which are nonbiodegradable.

1 To give an explanation, I guess, of how this works is generally to
2 make polyethylene you take oil, crack it, you make ethane and polyethylene,
3 and you either have to take that and place it in a landfill, where you have
4 landfill issues, or you can incinerate it. When you incinerate it, you create
5 carbon dioxide.

6 So the industry said, We have this landfill/carbon dioxide issue. The
7 way to remedy that is to make a biodegradable product so it doesn't, you
8 know, clog landfills or doesn't create carbon dioxide.

9 What the invention relates to is a new approach to that problem -- the
10 environmental problem. They've said, Well, if we make polyethylene from
11 renewable resources, we can counteract that environmental problem in a
12 completely different manner.

13 So what they've done -- when you say "renewable," it's generally plant
14 matter that's been formed into ethanol, ethane and polyethylene. Plants as
15 they grow will absorb carbon dioxide.

16 As you absorb carbon dioxide, you're depleting from your carbon
17 footprint. As they go through, then when you get to the polyethylene, now
18 the fact that it's not biodegradable is not nearly the issue.

19 There's still landfill issues, but you can solve that by incinerating. The
20 carbon dioxide you create by that incineration now is not an issue because
21 you've absorbed carbon dioxide to create it. So you have a net zero in your
22 carbon dioxide.

23 That's something that the industry was not focused on, and we have
24 these claims directed to, you know, method of making absorbent articles,
25 and this just wasn't done.

26 In some regards each of the steps along the way may have been

1 known, but this combination and this use of this process to make an
2 absorbent article just was not recognized. It's something that, you know, we
3 can all recognize the environmental thing while it's big now; it's been a big
4 issue for a while.

5 Any time you're dealing with the oil industry and petroleum as a
6 starting material, you have to focus on the fact this is a big issue. It's been a
7 big issue, and yet nobody has come along and recognized that you could do
8 this.

9 So focusing on the claims as a whole, I think it really is where the
10 focus has to be that, you know, everybody was looking at this and nobody
11 came up with a solution.

12 That's, I think, the main point that sometimes was lost in the
13 arguments during prosecution. This is something that's really an innovative,
14 new way to do something old. You know, it'll have a big impact in terms of
15 looking at your secondary considerations and those matters. I think there are
16 a lot of those that are met.

17 I didn't have a chance to brief KSR preparing the appeal brief. During
18 my review of KSR, I didn't particularly notice anything that appears to be
19 amiss or counter to my arguments, and it was focused on saying go back to
20 your grand factor test and just kind of the state as it was.

21 As this isn't a specific combination of two specifics parts, I don't think
22 KSR really, you know, changes the argument. In fact, it may reinforce it in
23 terms of the need to look at this as something that's satisfied a need in the
24 industry that hasn't been there when the entire focus has been to teach away.

25 I can go into the art a little bit, I can answer some questions. This is
26 kind of the point. I can keep hammering this, or I can answer questions if

1 you have any.

2 JUDGE CRAWFORD: Would it be fair to characterize this as a
3 situation where you have a solution or improvement using renewable
4 sources for products in some industries, but perhaps not in the absorbent
5 article industry, that would be equally applicable and would similarly
6 improve the absorbent products? Much like the situation KSR describes.

7 MR. BOONE: Yes, in some regards. I don't want to say yes, but I
8 think you'd have to look at each thing uniquely, and in terms of anything
9 where you have disposable polyethylene then I think the answer is yes.

10 I think, you know, you have to deal with industries that have a high
11 volume of this product with, for example, disposable diapers or disposable
12 hygiene products. You have this high volume of polyethylene that's being
13 used, and there hasn't been something that's an equivalent product in terms
14 of function and feel.

15 JUDGE CRAWFORD: Wouldn't the volume make it all the more
16 obvious?

17 MR. BOONE: One would think, but I think that's the significance of
18 the fact that no one has done it. If it's so obvious, you know, in 20 years of
19 looking at these environmental issues, it's never been captured.

20 JUDGE PATE: That's the old argument that the graveyard of all
21 obvious inventions is the abandoned files. Nobody has done it, but we don't
22 know how many abandoned applications were rejected.

23 MR. BOONE: I agree.

24 JUDGE PATE: Any questions?

25 I have no questions for you.

26 Do you have any other remarks?

1 MR. BOONE: Just to comment specifically on the rejections by the
2 examiner, I'm always concerned in terms of these appeals of other ideas out
3 there.

4 But specifically, with the art at issue I think a very strong argument
5 can be made that this is an improper rejection in terms of the fact that the art
6 -- I think the reference there to Toms, Cargill and Clint -- that all are
7 specifically teaching away from exactly what we've claimed. They say we
8 need biodegradable. Don't use nonbiodegradable polyethylene.

9 Their focus, in terms of basically a very specific teaching away, I
10 think is a correct indication that they're improperly used or an improper
11 combination.

12 JUDGE CRAWFORD: How is it teaching away? How is it
13 inconsistent to make the product biodegradable? How is that inconsistent
14 with using a renewable source for the ethane?

15 MR. BOONE: Inconsistent in the regards that they say don't use --
16 they say do not use nonbiodegradable. We have claimed a
17 nonbiodegradable product.

18 For example, in claim 1, the 100 percent polyethylene, that's the -- if
19 you have a pure polyethylene backbone, it's not biodegradable. I think --

20 JUDGE PATE: I was interested in that limitation. It says wherein the
21 polyethylene is polyethylene?

22 MR. BOONE: I will admit I picked this prosecution up midstream
23 and I may not have done that, but with that limitation -- that is -- yeah, that is
24 what that is.

25 It's 100 percent saying polyethylene, which you could view as maybe
26 a genus of polyethylene that has starch or something in it that makes it

1 biodegradable, versus 100 percent polyethylene, indicating it's just the
2 ethane components in the backbone and you only have polyethylene itself --
3 a pure form of polyethylene, which is not biodegradable.

4 JUDGE PATE: Right, but it has the transition phrase consists. If it
5 was comprising, then you would have an argument, but since it says
6 consists, that means it's not open to any other materials anyway. So
7 polyethylene consists of polyethylene -- it's like a tautology.

8 MR. BOONE: Polyethylene --

9 JUDGE PATE: I'm not going to bust your chops about it.

10 JUDGE CRAWFORD: It doesn't say the component consists of, it
11 says the polyethylene consists of.

12 MR. BOONE: That was the purpose of that limitation, to indicate it's
13 just a chain of just polyethylene.

14 JUDGE PATE: Right, there's no starches or anything else in it that
15 would make it biodegradable.

16 MR. BOONE: Correct.

17 JUDGE PATE: We understand that's how you make these plastics
18 biodegradable.

19 MR. BOONE: Yes.

20 JUDGE PATE: Thank you very much. We'll take this case under
21 advisement.

22 MR. BOONE: Thank you for your time.

23 JUDGE PATE: Surely.

24 Whereupon, the proceedings at 1:35 p.m. were concluded.